Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

ALBANY INSURANCE COMPANY,

Petitioner,

v.

BANCO MEXICANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under federal common law, does *The BREMEN* rule bar as "unreasonable or unjust" the dismissal of an American plaintiff's action, on a motion under Fed. R. Civ. P. 12(b)(3) based on a foreign forum selection clause, where the court — without allowing the plaintiff a hearing, oral argument, discovery or an opportunity to respond — resolved factual issues against the plaintiff and relied solely on evidence of a forum selection clause submitted for the first time in the movant's reply papers?

2. Does federal common law bar dismissal of an American plaintiff's action based on a foreign forum selection clause where the movant is not a party to the contract containing the clause and no claims or defenses are based on the contract?

3. Is enforcement of a foreign forum selection clause "unreasonable and unjust" where the court disregards the uncontradicted record that in a recent case the movant, acting in concert with the foreign forum's legal authorities, had corruptly used that foreign legal system to coerce, torture and imprison a similar business enemy?

DESIGNATION OF CORPORATE RELATIONSHIPS

Albany Insurance Company ("Albany") filing this petition for a *writ of certiorari* as petitioner states:

Liberty Mutual Insurance Company is the parent corporation of Albany. There is no publicly held company that owns 10% or more of Albany's stock.

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Petitioner, Albany Insurance Company ("Albany"), respectfully requests that a *writ of certiorari* be issued to review the summary order and judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The summary order of the United States Court of Appeals for the Second Circuit is not published, but can be found on *Westlaw* through the decision reported at *Albany Insurance Co. v. Banco Mexicano, S.A.*, 182 F.3d 898 (2d Cir. 1999) (App. A). The opinion of the district court is not published, but can be found at 1998 WL 730337 (S.D.N.Y. Oct. 19, 1998) (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit ("Court of Appeals") was entered on July 2, 1999. The Court of Appeals denied a timely petition for rehearing on August 18, 1999 (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 12(b)(3), (g) and (h) of the Federal Rules of Civil Procedure provides in relevant part as follows:

> Rule 12. Defenses and Objections — When and How Presented-By Pleading or Motion-Motion for Judgment on Pleadings
>
> * * *
>
> (b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following

defenses may at the option of the pleader be made by motion: . . . (3) improper venue. . . .

* * *

(g) Consolidation of Defenses in Motion. . . . If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted. . . .

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of . . . improper venue . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Rule 103(a)(1) of the Federal Rules of Evidence provides in pertinent part as follows:

Rule 103. Rulings on Evidence

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context.

STATEMENT OF THE CASE

The fundamental question presented in this case is whether the dismissal of an American plaintiff's action is "unreasonable or unjust" under the federal common law governing enforcement of foreign forum selection clauses, established by this Court in *M/S BREMEN v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The BREMEN*"), where the district court invokes a foreign forum selection clause in a contract to which the movant was not a party and, in doing so without allowing plaintiff a hearing, oral argument or any opportunity to reply, relies solely on new evidence raised by the movant for the first time in reply papers. The question arises in the context of a Rule 12(b) motion to dismiss. The decision of the Court of Appeals conflicts with this Court's holding in *The BREMEN* and its progeny, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), and *Vimar Seguros y Reaseguros, S.A. v. M/V SKY REEFER*, 515 U.S. 528 (1995), and with a decision of the Court of Appeals for the Third Circuit, *Dayhoff, Inc. v. H. J. Heinz Co.*, 86 F.3d 1287 (3d Cir. 1996), *cert. denied, H. J. Heinz Co. v. Dayhoff, Inc.*, 519 U.S. 1028 (1996); unjustly dismisses an American plaintiff from its chosen home forum; and threatens to disrupt the orderly administration of justice by encouraging litigants to engage in the practice of "sandbagging" when filing motions to dismiss.

The decision below is, in the words of Justice Stevens' dissenting opinion in *SKY REEFER*, "an excellent example of overzealous formalism." 515 U.S. at 556.

A. The Facts

The relevant facts are essentially undisputed except as noted, and are as follows:

1. *The Coffee Losses*

Albany, a New York insurance corporation, is the subrogated insurer of Contitrade Services Corporation,

Continental Grain Co. and Coffee Trade Services, Inc. (collectively "CTS"), companies also domiciled in New York. In 1989, CTS provided financing to purchase Mexican coffee and to import the coffee into the United States. CTS entered into agreements for financing with Mexican coffee exporters, including Cafetelera Zardain S.A. de C.V. ("Zardain"). In exchange for financing, CTS received negotiable warehouse receipts ("certificados de deposito" or "certificates of deposit") issued by a Mexican warehouse, Almacenadora Somex ("Somex"). The certificados evidenced the financed coffee.

Somex is a wholly-owned subsidiary of respondent Banco Mexicano, S.A. ("Banco Mexicano"), a banking organization domiciled in Mexico. Banco Mexicano controlled Somex.

Somex issued certificados for bags of green coffee delivered by Zardain for storage in Somex's warehouses. It is undisputed that CTS returned those certificados to Somex. On or about November 27, 1990, CTS demanded that Somex deliver the coffee. Somex refused to deliver the coffee because the coffee was short or missing from the warehouses or was damaged.

2. *The Banco Mexicano Agreement*

On behalf of Banco Mexicano, Juan Foncerada Moreno and Gabriel Perez Rios Aguilar ("Perez Rios") represented to CTS that the bags of coffee were missing. Banco Mexicano offered CTS a quantity of coffee and cash, valued at less than forty percent (40%) of the market value of the coffee, in exchange for CTS's delivery of the certificados to Somex. Banco Mexicano represented that, if CTS failed to agree, Somex would distribute all remaining cash and coffee to another certificado holder, and Banco Mexicano would place Somex in bankruptcy. Relying on these representations, CTS agreed with Banco Mexicano that Banco Mexicano would pay CTS $800,000 against delivery of the warehouse

receipts to Somex. CTS returned the certificados and received payment from Banco Mexicano.

B. The Proceedings Below

1. *The Pleadings*

Albany commenced this action against Banco Mexicano on December 17, 1996, to recover damages for Banco Mexicano's breach of contract, negligence, conversion, fraud and tortious interference with contractual relations between CTS and, among others, Zardain. Albany alleges that Banco Mexicano fraudulently (1) understated the quantity and quality of coffee in Somex's warehouses and the available cash of Somex to satisfy the value of coffee that CTS was entitled to receive, and (2) never intended to place Somex into bankruptcy, as it had represented.

Albany alleges in particular that Banco Mexicano falsely represented that it was "sharing in the losses." Albany contends the misrepresentations were made as part of a fraudulent scheme to induce CTS not to insist that Somex satisfy the full value of its loss and to assist Banco Mexicano in obtaining full payment of debts owed to it by coffee exporters. It is uncontroverted that Banco Mexicano sold CTS's coffee for a profit and was thereby unjustly enriched.

In its answer, Banco Mexicano objected to improper venue; denied that it was engaged in the business of warehousing; and alleged that it is *not* a party to the certificados.

2. *The Motion To Dismiss*

Banco Mexicano conceded personal jurisdiction, but moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(3) and 12(h)(1) for improper venue. Banco Mexicano advanced a single objection for its motion: that a forum selection clause in Somex's certificados requires CTS to litigate against Banco Mexicano in the tribunals of Mexico City. The sole evidence offered by Banco Mexicano's motion

was the affidavit of its New York attorney ("the Karlinsky Affidavit").

The Karlinsky Affidavit contains no representation that the affiant has personal knowledge of the facts alleged. It contains one exhibit: copies of documents in Spanish alleged to comprise "[t]rue copies of the Certificados which form the basis of Albany's claim. . . ." The affidavit contains no statement of any competent basis to authenticate the documents or to translate them into English. The affidavit purports to offer an English translation of the alleged forum selection clause in "[e]ach of the Certificados."

The affidavit relies solely on the certificados. It does not allege that any other document contains a forum selection clause. The Karlinsky Affidavit alleges: "Somex issued negotiable warehouse documents styled Certificados de Deposito ("Certificados"). These evidenced the deposited coffee, and gave the holder the right to demand delivery of that quantity of coffee." The affidavit purported to attach "[t]rue copies of the Certificados" as "Exhibit A," the sole exhibit. However, the exhibit also contained copies of a second type of document, called bonos de prenda. The Karlinsky Affidavit nowhere mentions the bonos de prenda. In addition, the Karlinsky Affidavit avers that "Somex issued the various Certificados" in the exhibit to a "Sr. Fernando Coello." It alleges that "Sr. Coello endorsed the Certificados and negotiated them to [CTS] in connection with certain financing arrangements between CTS and others related to the purchase and importation of Mexican coffee."

Contrary to Banco Mexicano's representations and the Karlinsky Affidavit, however, the certificados contain no forum selection clause. This fact is undisputed.

Prior to the motion, Albany had served Banco Mexicano with discovery requests relating to the venue defense raised in Banco Mexicano's answer. Albany specifically requested that Banco Mexicano produce documents, and noticed the

deposition of Gabriel Perez Rios Aguilar ("Perez Rios") and other witnesses relating to the venue issues. Banco Mexicano objected to many of the requests, produced no relevant documents, and failed to produce even the documents that it later relied upon as its one moving exhibit (the certificados). Banco Mexicano also refused to make Perez Rios or any of the witnesses available for deposition. When Banco Mexicano moved to dismiss, Albany attempted unsuccessfully to resolve Banco Mexicano's refusal to comply with discovery, then brought this dispute to the district court's attention in its answering papers, and requested the opportunity to conclude such discovery.

After Albany opposed the motion, Banco Mexicano submitted a reply memorandum and an alleged reply affidavit by another of its lawyers, Perez Rios ("the Perez Rios Affidavit"). In the reply, Banco Mexicano abandoned its earlier factual assertion that the certificados contained the forum clause. Instead, it supplemented the grounds of its motion by alleging that the clause was actually contained not in the certificados, but in a different document called a bono de prenda, or pledge bond.

Albany objected that these papers violated the district judge's Rule 15 on the ground they contained arguments and evidence that were raised for the first time by reply and were not responsive to Albany's answering papers. Albany pointed out that Banco Mexicano's reply did not refer to the original evidence offered, and objected that Banco Mexicano was attempting to supply the grounds missing from its original motion by the new evidence submitted in its reply. As the court's Rule 15 also prohibited sur-replies, Albany asked the court to disregard the reply papers or to grant "leave to submit a brief sur-reply or to address these points at oral argument should the Court prefer." The court failed to respond or rule on the issue.

The Perez Rios Affidavit contains contradictory assertions of the basis for the affidavit's statements. Perez Rios avers that he is "legal counsel of Banco Mexicano Santander Mexicano (successor ro Banco Mexicano, S.A.)". He further avers that he has "personal knowledge of the facts stated herein." However, he asserts in the very next sentence that "[t]o some extent, my knowledge is based on investigations I have made or caused to be made in connection with this or other litigations." The affidavit does not distinguish between statements allegedly based on personal knowledge and hearsay statements based on knowledge gained from some, unspecified "investigation."

The Perez Rios Affidavit also advanced evidence not contained in the moving papers and not responsive to Albany's opposition, and thus raised new issues. For example, the following assertions by Perez Rios were new and did not reply to any factual assertion by Albany:

> 1. Somex *simultaneously* issued negotiable warehouse documents styled Certificados de Deposito ("Certificados"), *and Bonos de Prenda ("Bonos") collectively, the ("Receipts")*. These *Receipts* evidenced the deposited coffee, and gave the holder the right to demand delivery of that quantity of coffee. True copies of the Certificados *and Bonos* which form the basis of Albany's claim, *and English language translations thereof*, are attached hereto as Exhibit A.

This assertion repeats word for word the language in paragraph "4" of the Karlinsky Affidavit, but adds the above words that are italicized. Albany's opposition did not dispute the Karlinsky Affidavit's allegations that the certificados were issued and evidenced the coffee. The Perez Rios affidavit, however, added evidence of the Bonos and translations not supplied originally.

2. "*[S]omex contemporaneously issued both a Certificado and a Bono. . . .*"

This assertion likewise did not reply to any factual assertion by Albany's opposition; the italicized language advanced a new allegation. Albany's opposition did not raise any issue of whether a certificado was "contemporaneously issued" with "a Bono."

About one year after the motion to dismiss was filed, the district court issued a memorandum and order granting Banco Mexicano's motion to dismiss. By summary order dated July 2, 1999, the Court of Appeals affirmed the district court's order of dismissal. The Court of Appeals denied Albany's petition for rehearing on August 18, 1999.

REASONS FOR GRANTING THE WRIT

Introduction

The Court of Appeals for the Second Circuit has here deprived an American plaintiff of its day in its own court by woodenly approving a sea change departure from this Court's rule in *The BREMEN*, 407 U.S. 1 (1972). In *The BREMEN*, this Court applied the federal common law to enforce a foreign forum selection clause between parties to a contract containing such a clause. Since then, the courts have routinely upheld such clauses by granting motions to dismiss under Fed. R. Civ. P. 12(b)(3) and otherwise. Here, however, the Court of Appeals has extended the rule beyond the bounds of practical justice by applying it to enforce such a clause on the motion to dismiss of a *non-party* to the contract containing the clause, despite a record demonstrating that dismissal would be unreasonable and unjust.

In accomplishing this leap of federal common law, the decision of the Court of Appeals conflicts with the decisions of this Court and of other courts of appeals (including other panels of the Second Circuit) in several respects.

First, the court's decision granted a motion to dismiss under Fed. R. Civ. P. 12(b)(3) on a foreign forum selection clause by resolving disputed factual issues against the plaintiff and by relying solely on evidence submitted for the first time in the movant's reply papers. The court failed to allow plaintiff a hearing, oral argument, requested discovery or an opportunity to respond. By so doing, the court's decision endorsed a one-sided procedure that denied the plaintiff any opportunity to respond to the evidence upon which the court based dismissal.

Secondly, the court's decision enforced such a clause in favor of a non-party to the contract containing the clause and applied the clause despite the absence of any claims or defenses based on that contract. In so deciding, the court strained to find a formulaic basis for concluding that the parties contractually agreed to the foreign forum, when in truth they did not.

Third, the court ignored the requirement of *The BREMEN* that enforcement of such a clause should be denied if litigation in the foreign forum would unreasonably deprive the plaintiff of its day in court. The court did recognize that, according to the uncontradicted record, in a recent case the movant, acting in concert with the foreign forum's legal authorities, has corruptly used that legal system to coerce, torture and imprison a similar business enemy. However, the court amazingly misapprehended the result implicit in this finding — that a meaningful or safe day in the foreign court is as good as non-existent and that remission to the foreign forum constitutes "a practical immunization" against liability, *SKY REEFER*, 515 U.S. at 553 (Stevens, J., dissenting) — and, using a man of straw argument, declined "a wholesale rejection of Mexico as a forum" based on such "unfortunate instances."

These steps by the Court of Appeals distort the rule in *The BREMEN*. They sanction an unreasonable and unjust

departure from the accepted and usual course of judicial proceedings under the federal common law established in *The BREMEN*. This result demonstrates the need for this Court to bring the decision below into conformity with this Court's precedents, to refine the analysis of *The BREMEN* to account for the practical realities of form contracts in international commerce, and to define a fair and efficient procedure for determining their enforcement. This result urgently calls for an exercise of this Court's supervisory power. A uniform rule will dispel the confusion in the lower courts, spare the litigants the time and expense of unnecessary motions, and conserve judicial resources that otherwise would be devoted to deciding the motions. This Court has never yet approved such a one-sided rush to rid a case from the court's docket as has marked the dismissal here in the courts below.

I.

THE OPINION BELOW CONFLICTS WITH THIS COURT'S FEDERAL COMMON LAW RULE IN *THE BREMEN* AUTHORIZING THE ENFORCEMENT OF FOREIGN FORUM SELECTION CLAUSES UNLESS DISMISSAL WOULD PROVE UNREASONABLE AND UNJUST, AND WITH THE DECISIONS OF OTHER CIRCUITS; THIS COURT'S GUIDANCE IS NEEDED TO RESOLVE THE CONFLICT, TO REFINE *THE BREMEN'S* ANALYSIS, AND TO EFFECT PRACTICAL JUSTICE.

In *The BREMEN*, 407 U.S. at 9-10, this Court held that forum selection clauses, although not "historically . . . favored," are "*prima facie* valid, unless enforcement is shown . . . to be 'unreasonable' under the circumstances." Here, the record demonstrates that the court below should not have enforced the foreign forum selection clause under *The BREMEN* rule. Enforcement was "unreasonable and unjust," and in fact no such clause applies here.

The Court of Appeals overlooked that Albany established a *prima facie* showing that it did not agree to any forum selection clause in the certificates of deposit. Banco Mexicano failed to prove that a forum selection clause exists in the certificados, as its moving papers alleged. Banco Mexicano failed to submit evidence or argue in its moving papers that a forum clause in a pledge bond existed or applied. The complaint makes no reference to a pledge bond. The moving papers make no reference to a pledge bond. No claim or defense is asserted here based on or relating to a pledge bond. Moreover, there is no allegation that a determination of the action requires interpretation of such a document.

In determining a motion to dismiss, as here, the court must view the record in the light most favorable to Albany, the non- movant. *See United States v. Diebold*, 369 U.S. 654, 655 (1962); *New Moon Shipping Co., Ltd. v. MAN B&W Diesel AG*, 121 F.3d 24, 29 (2d Cir. 1997). Uncontroverted allegations in the plaintiff's complaint are presumed true. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.*, 84 F.3d 560, 567 (2d Cir.), *cert. denied*, 519 U.S. 1006 (1996). All factual disputes must be decided in plaintiff's favor. *New Moon*, 121 F.3d at 29. Further, the review by the Court of Appeals "is limited to the question of whether appellants made a *prima facie* showing that they did not agree to the [forum selection clause]." 121 F.3d at 29.

In reversing a dismissal based on a forum selection clause, the Court of Appeals had recently observed in *New Moon*:

> When analyzing this preliminary showing, the facts must be viewed in the light most favorable to the plaintiff. A disputed fact may be resolved in a manner adverse to the plaintiff *only after an evidentiary hearing*. Because the same risk of loss of plaintiff's chosen forum may be at issue in the forum selection context, a party seeking to avoid

> enforcement of such a contractual clause is also entitled to have the facts viewed in the light most favorable to it, and *no disputed fact should be resolved against that party until it has had an opportunity to be heard.*

121 F.3d at 29 (*Citations omitted*) (*Emphasis added*).

Under this standard, Albany established a *prima facie* case of proper venue and its action should not have been dismissed.

In enforcing the forum selection clause in the pledge bond against Albany, the court misread the clause and the complaint, misperceived the legal arguments and misapplied the law. The court looked beyond the moving evidence to find a forum clause in the supplemental materials raised by Banco Mexicano for the first time in its reply papers. The court then refused to allow Albany an opportunity to be heard in response or to conduct requested discovery. Instead, the court resolved factual disputes and inferences against Albany; violated its own court Rule 15 prohibiting new matters to be raised by the movant for the first time in reply; failed to accept as true the uncontroverted allegations of the complaint; failed to view the facts in a light most favorable to Albany; and, relied on unauthenticated and inadmissible evidence to conclude that the pledge bond's forum clause should be read as part of an integrated contract with the certificados.

The court determined the facts alleged by the Mexican attorney's reply affidavit in a manner adverse to Albany, including the facts relating to whether the warehouse receipts and loan notes correspond to each other, were issued at the same time, or must be presented together. As the non-moving party, however, Albany is entitled to the inference that these documents have different legal significance and different purposes.

By doing so, the court below ignored the rule that new allegations, arguments or issues raised for the first time in a

reply should be disregarded as a matter of law. *See Ernst Haas Studio, Inc. v. Palm Press, Inc.*, 164 F.3d 110, 112 (2d Cir. 1999); *Playboy Enterprises, Inc. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y. 1997), *aff'd mem. substantially for reasons stated by the court*, 159 F.3d 1347 (2d Cir. 1998); *Knipe v. Skinner*, 999 F.2d 708, 711 (2d Cir. 1993); *Domino Media, Inc. v. Kranis*, 9 F. Supp.2d 374 (S.D.N.Y. 1998), *aff'd mem.*, 173 F.3d 843 (2d Cir. 1999) (new arguments first raised in reply papers will not be considered). As observed in *Dumas*, 960 F. Supp. at 720, in an opinion affirmed by the Second Circuit on the same reasoning:

> It would be manifestly unfair to allow [a movant] to make a complex and possibly dispositive argument after [the non-movant's] opportunity to respond has passed, thereby silencing [the non-movant] on the issue and depriving the Court of [the non-movant's] views on the question raised. . . . Such behavior should not be rewarded.

In *Carnival Cruise*, 499 U.S. at 591, this Court observed that in *The BREMEN*, "[t]he court did not define precisely the circumstances that would make it unreasonable for a court to enforce a forum clause." To avoid the outrageous result of dismissal on such a flimsy showing here, "the Court must draw a line somewhere." *SKY REEFER*, 515 U.S. at 552, n.13 (Stevens, J., dissenting). The decision of the Court of Appeals highlights the need for this Court to further refine the analysis of those circumstances, as here, that make enforcement "unreasonable and unjust." This Court need not defer to the lower courts' findings of fact. 499 U.S. at 594.

A. The Court Below Disregarded Its Own Rule 15 And Fed. R. Civ. P. 12(g) By Improperly Relying On New Evidence And A New Objection First Raised By Banco Mexicano in Reply.

In finding that a forum selection clause applied to the certificados through the pledge bonds, the court wrongly

concluded that the documents comprised integrated contracts under New York law. The court based its decision on new evidence and a new objection submitted by Banco Mexicano for the first time only after Albany had answered the motion. By doing so, the lower court disregarded its own Rule 15 prohibiting the submission of new material in reply papers.[1] The court also ignored the prohibition of Fed. R. Civ. P. 12(g) against raising new "defenses or objections" that were not included in the original motion to dismiss. Albany never had an opportunity to respond to the evidence relied upon by the court, and so objected.

The Court of Appeals further overlooked Albany's objections to the moving and reply affidavits and its request for leave to file a sur-reply. Incredibly, the court incorrectly determined that Albany's objections to the admissibility of the reply affidavit "were waived by its failure to seek a motion to strike the affidavit on these grounds in the district court. *See* Fed. R. Evid., 103(a)(1)." (A9a) The court overlooked that the district court's Rule 15 prohibiting sur-replies precluded Albany from advancing a more detailed objection than it did by its counsel's letter of October 27, 1997. The court referred inaccurately to this letter objection, and overlooked the request for leave to object to the reply evidence in footnote 3 of the summary order. (A9a)

In that letter, Albany's counsel objects to the reply papers on the grounds that, *inter alia,* they "*contain arguments and evidence which are raised for the first time by reply* and are not responsive to plaintiff's answering papers." (Emphasis added.) Albany's counsel further requested an opportunity to submit by sur-reply or at oral argument "the arguments and evidence that refute the points raised by defendants in their reply for the first time *and that show the reply affidavit*

1. Banco Mexicano's reply papers, therefore, should not have treated any issue that Albany's answering papers did not address. However, Banco Mexicano changed the ground of its objection in its reply and treated issues that Albany's papers did not address.

is unworthy of belief." Albany's counsel had previously objected to the moving affidavit of Banco Mexicano's New York counsel as inadequate, and would have specified similar grounds if allowed by the district court to do so. However, the district court never ruled on Albany's objection and request; its opinion fails to mention them.

In effect, Banco Mexicano's reply constituted a new motion to dismiss on a different ground. Banco Mexicano's original motion objected to venue on the ground that a forum clause in the certificados required dismissal. Albany answered by showing that there was no evidence of any forum clause in the certificados. In reply, Banco Mexicano did not dispute Albany's showing. It did not advance any argument or evidence to prove that the certificados had a forum clause as alleged by the motion. Instead, Banco Mexicano changed its objection from "the forum clause is in the certificados," to the new argument that "the forum clause is not in the certificados, it's in the pledge bonds." The original motion contained no such argument and no evidence to support it; so the reply attempted to cure the omission with the Perez Rios Affidavit.

Rule 12(g), Fed. R. Civ. P., requires that all such objections be raised together in the original motion. The Rule provides in relevant part: "If a party makes a motion under this rule but omits therefrom any defense or *objection* then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted." (Emphasis added.) Banco Mexicano failed to include in its motion the objection to venue based on the pledge bonds allegedly containing a forum clause, and thus waived it. *See Albany Ins. Co. v. Almacenadora Somex*, 5 F.3d 907 (5th Cir. 1993); *Sangdahl v. Litton*, 69 F.R.D. 641, 642-43 (S.D.N.Y. 1976) (Weinfeld, J.).

The Court of Appeals also misapprehended that "any evidentiary defect in the [moving] affidavit is harmless." (A9a) The court concluded that the only evidence submitted in support of the motion to dismiss "was not necessary to the district court's decision. . . ." *Id.* The court's conclusion, therefore, acknowledges that the only evidence relied on to dismiss Albany's action was the new evidence in reply, which Albany was precluded from addressing.

In so concluding, the court cited a comparative reference to an inapposite case, *Tropea v. Shell Oil Co.*, 307 F.2d 757, 763 (2d Cir. 1962). In *Tropea,* unlike here, the court found sufficient cumulative evidence *after a trial.* Unlike in *Tropea,* the instant case involves a motion to dismiss where no moving evidence existed to support the alleged grounds of the motion.

The court relied exclusively on the Perez Rios Affidavit in concluding that, "[a]s integrated agreements, the forum selection clause which appears in the loan notes applies to a suit upon the corresponding warehouse receipts." Neither this evidence nor the "integrated agreement" argument appears in the moving papers. In addition, the court erroneously relied on the Karlinsky Affidavit's paragraph 6 as the basis for the assertion that "[e]ach *loan note*" included a forum clause. (Emphasis added.) In fact, that paragraph states, "Each of the *Certificados* . . ." contained a forum clause. (Emphasis added.) Further, the court erred in citing to the Karlinsky Affidavit's Exhibit A as the basis for its assertion that "[e]ach set of documents [— presumably referring to the certificados and the loan notes —] was signed at the same time." That exhibit, untranslated Spanish language forms, contains no evidence so stating.

B. The Court Failed to Allow Requested Discovery.

The court further overlooked that a motion to dismiss generally should not be granted without allowing the non-movant an opportunity for discovery on the issues raised by the motion. *Leasco Data Processing Equipment Corp. v.*

Maxwell, 468 F.2d 1326 (2d Cir. 1972). The court's decision to the contrary here conflicts with the decisions of the Second Circuit and other circuit courts. At least the Fifth and Ninth Circuits have recognized: "[A] plaintiff ordinarily should not be required to rely on movant's affidavits in a motion to dismiss, and . . . should be able to conduct directed discovery on the issues raised by the motion. *Blanco v. Carigulf Lines,* 632 F.2d 656, 658 (5th Cir. 1980)." *Cheng v. Boeing Co.,* 708 F.2d 1406, 1412 (9th Cir.), *cert. denied, Lui Su Nai-Chao v. Boeing Co.*, 464 U.S. 1017 (1983). The court failed to allow Albany discovery on the issues.

The court failed to recognize that Albany had objected to Banco Mexicano's refusal to provide requested discovery. Prior to the motion to dismiss, Albany had requested the deposition of Banco Mexicano's attorney (who later submitted the reply affidavit) and the production of documents. The district court's opinion fails even to mention Albany's request for discovery. The Court of Appeals likewise overlooks this record, and the argument by Albany's counsel in its letter to the district court that a reply opportunity could show that the Mexican attorney's affidavit was unworthy of belief.

The dismissal here conflicts not only with *The BREMEN* but with decisions of other circuit courts. In *The BREMEN,* unlike here, the forum selection clause was upheld on the basis of "strong evidence that the forum clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations" with the clause in mind. *Carnival Cruise,* 499 U.S. at 591-92. Unlike *The BREMEN* and *Carnival Cruise*, there is no evidence or admission here that the plaintiff had notice of the forum selection clause. This Court in *Carnival Cruise* emphasized that such notice was conceded. Other circuit courts have not enforced a forum selection clause on a record as sparse and procedurally defective as that here. *Cf., e.g., Albany*, 5 F.3d 907 (5th Cir. 1993); *Snyder v. Lone Star Art Trading Co.,*

Inc., 659 F. Supp. 1249, *reconsideration denied*, 672 F. Supp. 977 (E.D. Mich. 1987), *aff'd*, 838 F.2d 1215 (6th Cir. 1988).

After Banco Mexicano's supplemental submission following its original motion, the court refused to allow Albany any opportunity to be heard at oral argument by a sur-reply. The court's decision to disbelieve the factual assertions set forth by Albany, "— one that ultimately turns on the credibility of opposing parties —," *New Moon*, 121 F.3d at 29, was made without allowing Albany an evidentiary hearing or the slightest opportunity to be heard. Such a result offends traditional notions of fair play and invites this Court's scrutiny.

II.

THIS COURT'S REVIEW IS WARRANTED TO RESOLVE THE CONFLICT OF THE OPINION BELOW WITH *THE BREMEN* AND OTHER CIRCUIT COURTS BY ITS ONE-SIDED ENFORCEMENT OF A FOREIGN FORUM SELECTION CLAUSE BY A NON-PARTY TO THE CONTRACT WHERE NO CLAIM OR DEFENSE RELATES TO THE CONTRACT.

The Court of Appeals here extended the rule in *The BREMEN* and its progeny to enforce a forum selection clause to which the movant was not even a party. Such a result is compelled neither by law nor common sense. As this Court recognized in a similar context in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 946-47 (1985), addressing an arbitration agreement:

> [A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes — but only those disputes — that the parties have agreed to submit to arbitration. . . . After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure

> that commercial arbitration agreements, like other contracts, "are enforced according to their terms."
>
> . . .

(Citations omitted).

The Court's reasoning in *Kaplan* applies with equal force to the contract matter here, and requires reversal. As a non-party to the certificados and the pledge bonds, Banco Mexicano has no right to enforce any forum clause in the pledge bonds, even if the two documents are interpreted together as integrated agreements. In *The BREMEN*, the court enforced a forum selection clause contained in a freely negotiated contract between the parties. The clause there by its terms covered the disputes in issue. Unlike *The BREMEN*, the clause is not contained in a contract between the parties, was in no sense negotiated between them, and by its terms does not cover the dispute here. The result below defies the federal common law rules of *The BREMEN* and *Kaplan*.

The Court of Appeals erroneously concluded that Banco Mexicano "may assert the contracts' forum selection clause, . . . because it is being forced to defend against contract claims." The sole authority advanced for this conclusion was the following statement: "Defendant may not use the contracts as a sword without also permitting Banco Mexicano's use of the contracts' shields." (*Citing Tepper Realty Co. v. Mosiac Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966)).

The Court of Appeals overlooked that the complaint does not allege liability of Banco Mexicano based on the certificates of deposit or the pledge bonds; the court, therefore, misapprehended that Albany was attempting to use the certificates or notes "as a sword" against Banco Mexicano, and misplaced reliance on the *Tepper* case.

The court misperceived that Albany's claims against Banco Mexicano relate to the loan notes by concluding that

the complaint "is replete with references to the *receipts*." (Emphasis added.) However, none of those references seek enforcement or interpretation of the *certificates* or the *loan notes*. The examples cited by the court refer to failures of *Somex* (a non-party in this action), *not Banco Mexicano*, relating to the certificates. None of the complaint's references involve the loan notes.

Further, the court misapprehended Albany's contention that the forum clause in the loan notes does not apply to this dispute. The panel mischaracterized Albany's contention as: "(2) the forum selection clause on the loan notes does not apply to disputes *arising out of the warehouse receipts*. . . ." (Emphasis added.) Albany does not contend, and no pleading alleges, that its claims against Banco Mexicano "arise out of" the warehouse receipts, or certificates of deposit.

The decision below, moreover, conflicts squarely with the Third Circuit's decision in *Dayhoff, Inc. v. H. J. Heinz Co.*, 86 F.3d 1287, 1294-97 (3d Cir), *cert. denied, H. J. Heinz Co. v. Dayhoff, Inc.*, 519 U.S. 1028 (1996), that a non-signatory to a contract is not bound by a forum selection clause in the contract because it had not agreed to the contract. In *Dayhoff*, the Third Circuit relied on *Kaplan* and rejected as "unacceptable" a conclusion similar to the decision below.[2] The Third Circuit reasoned that such a position gives the non-signatory the option to accept or reject the forum selection clause, while the other party is compelled to accede to the non-signatory's wishes: "The very fact [of] such a choice belies the existence of an agreement between [the parties]." 86 F.3d at 1297.

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2. The Third Circuit specifically declined to follow conflicting decisions of the Ninth, Seventh and Fourth Circuits. 86 F.3d at 1295-96.

A. The Certificados and the Bonos Constitute Separate and Distinct Agreements; As a Matter of Law, the Court Erred in Concluding They Were Integrated.

The Court of Appeals wrongly concluded that a forum selection clause in the pledge bond applies here. Albany's action against Banco Mexicano alleges breach of Banco Mexicano's separate contract with CTS (not the certificado or the bono), fraud and other tortious conduct. No claim or defense is asserted based on or relating to any pledge bond or any credit interest represented by such an instrument. Indeed, Banco Mexicano's original motion makes no mention of the pledge bonds; it contends that the certificados alone are controlling.[3]

The court erred in construing the certificado and the pledge bond as one instrument. The evidence relied upon by the court was insufficient as a matter of law to establish that the certificates of deposit and the loan notes were integrated contracts. *See Packer v. TDI Systems, Inc.*, 959 F. Supp. 192, 198-99 (S.D.N.Y. 1997) (refusing to apply forum clause). According to the loan notes, for example, both documents need not be presented to withdraw the deposited goods. The bond plainly does not apply to the certificate of deposits. The certificates make no reference to the issuance of any related bond, and blanks in which such information may be supplied are not filled in. The court overlooked that the "limited exception" specified in the loan notes (A6a) applies here to make presentation of both a loan note and a receipt unnecessary to obtain delivery of the goods specified in the receipt. The court clearly erred in stating to the contrary. *See Packer*, 959 F. Supp. at 198-99 (refusing to apply forum

3. Nor is there any explanation for the odd conflict between Banco Mexicano's original argument that the certificados were transferred to Fernando Coello (as asserted in its moving papers), and the absence of dispute in its reply papers to Albany's contention that the instant action has nothing to do with any certificados given to Coello.

clause by reading note and subordination agreement together as integrated contracts since defendant not a party to either contract); *Summers v. Guss*, 7 F. Supp.2d 237 (W.D.N.Y. 1998) (denying motion to dismiss based on Mexican forum clause in notes); *Dayhoff, Inc.*, 86 F.3d at 1294-97 (holding non-signatory not bound by forum clause because they had not agreed to it, and distinguishing *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988)).

The Court of Appeals reversed a dismissal on analogous facts in *New Moon*, 131 F.3d 24. There, as here, the lower court applied a forum selection clause in a contract and dismissed the action. There, as here, the lower court did so by construing disputed facts adverse to plaintiff relating to the scope and existence of a forum clause without an evidentiary hearing. In *New Moon*, the Court of Appeals held that the plaintiff's allegations should have been accepted as true and established a *prima facie* case. The court reasoned that the lower court should not have dismissed prior to an evidentiary hearing: "We agree with appellants that, at a minimum, a hearing should have been held at which they could have presented . . . testimony . . . and cross-examined [defendant's] witnesses . . . ." 121 F.3d at 30. The court's reasoning in *New Moon* applies with equal force here.

B. The Alleged Forum Clause Has No Application to Albany's Claims.

The court below misapprehended that, based on its erroneous finding "that the loan notes and warehouse receipts together formed an integrated contract," the forum clause applied "to Albany's claims under the receipts." (A6a) Yet, Albany's claims are not made "under the receipts," and the forum clause in the loan notes is limited to matters relating to "this instrument" — *i.e.*, the loan note. It is undisputed that no claim here seeks enforcement or interpretation of the loan notes.

The court erred in concluding that the forum clause in the pledge bond applies to Albany's claims against Banco Mexicano. The court incorrectly stated that Albany's claims related to interpretation of "the contract." In fact, the instant action does not seek to enforce rights under the certificados or the pledge bonds. Nor does any claim or defense require an interpretation of those documents.

Albany's claims fall outside the narrow scope of the alleged forum clause in the pledge bond. The clause is specifically limited to disputes relating to the pledge bond. Even if the certificados and the pledge bonds were construed together, the pledge bond's forum clause limits its application to "any question relative *to this instrument*" (emphasis added).[4] The instant claims involve no question relative to *the pledge bond*. No such question is alleged, and the court fails to specify one.

III.

THE PETITION SHOULD BE GRANTED TO CORRECT THE UNREASONABLE AND UNJUST DISMISSAL BASED ON THE SHOWING THAT THE MEXICO FORUM WOULD DEPRIVE ALBANY OF ITS DAY IN COURT.

Even assuming the pledge bond's forum clause applies here, enforcement of the clause would be "unreasonable and unjust" under the rule in *The BREMEN*. The court below wrongly rejected the evidence offered by Albany that enforcement of the forum clause would effectively deny Albany its day in court.

The Court of Appeals misperceived Albany's contention that enforcement of the forum clause would be unreasonable

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4. The court recognized that the English translation supplied in Banco Mexicano's supplemental submission differs from the original translation supplied in the Karlinsky Affidavit. Both translations are unauthenticated. The court inexplicably relied on the Karlinsky translation in its analysis.

and unjust. Albany argued that the uncontroverted evidence of the recent case in which Banco Mexicano, acting in concert with Mexican authorities, coerced, tortured and imprisoned "a business enemy," (A7a), shows — in the specific circumstances of this dispute — that it would be unreasonable and unjust to enforce a forum clause allowing Banco Mexicano to litigate this case in courts it has manipulated through its corrupting influence. Contrary to the court's conclusion, Albany did *not* contend that the Court should "extrapolate from those unfortunate instances to a wholesale rejection of Mexico has a forum." (A7a) The court's rationale rests on a "man of straw" argument; Albany did not urge "a wholesale rejection of Mexico as a forum."

The court disregarded the force of evidence demonstrating the questionable integrity of the Mexican judicial system in general — and specifically the abusive and corrupting influence Banco Mexicano has used to manipulate it. The record contains substantial evidence in a recent case detailing torture and imprisonment in Mexico of Banco Mexicano's business foes (at Banco Mexicano's instance). *Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 321-23 (9th Cir. 1996). The court's opinion in that case reveals such corrupt conduct, which was uncontroverted by Banco Mexicano's Perez Rios. 87 F.3d at 321-23 and nn.1, 6-7.

On this score also, the district court incorrectly failed to view the facts in the light most favorable to Albany, and dismissed these uncontroverted allegations and evidence as "not supported" and "mere allegations."

Such evidence militates strongly against dismissal. Indeed, a court of equity may refuse to enforce a forum clause in such circumstances as "unreasonable and unjust" based on the defendant's "unclean hands." *See New York Football Giants, Inc. v. Los Angeles Chargers Football Club, Inc.*, 291 F.2d 471 (5th Cir. 1961) (applying equitable principle in refusing to enforce contract rights asserted by party with

unclean hands). "Our international obligations do not require us to enforce a contractual term that was not freely negotiated by the parties." *SKY REEFER*, 515 U.S. at 553 (Stevens, J., dissenting). The result below calls for the Court to apply a common sense recognition that no agreement exists.

CONCLUSION

For all of these reasons, Albany respectfully requests that its petition for a *writ of certiorari* be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED JULY 2, 1999

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

* * *

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 2nd day of July, one thousand nine hundred ninety-nine.

PRESENT:

HON. GUIDO CALABRESI,
HON. FRED I. PARKER,
Circuit Judges,

HON. DAVID G. TRAGER,*
Judge.

98 - 9531

ALBANY INSURANCE COMPANY,

Plaintiff-Appellant,

v.

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* The Honorable David G. Trager, Judge of the United States District Court for the Eastern District of New York, sitting by designation.

Appendix A

BANCO MEXICANO, S.A.,

Defendant-Appellee.

SUMMARY ORDER

* * *

Appeal from the United States District Court for the Southern District of New York (Deborah A. Batts, *Judge*).

UPON DUE CONSIDERATION, it is ORDERED, ADJUDGED, AND DECREED that the judgment of the district court be and hereby is AFFIRMED.

Plaintiff-appellant Albany Insurance Company ("Albany") appeals from an order of the United States District Court for the Southern District of New York (Deborah A. Batts, *Judge*) granting the motion of defendant-appellee Banco Mexicano, S.A., to dismiss Albany's complaint pursuant to Federal Rule of Civil Procedure 12(b)(3) and (h)(1). The district court held that a forum selection clause designating the courts of Mexico City as the only appropriate forum applied to Albany's complaint. We affirm.

I. BACKGROUND

During the period of time relevant to this case, Banco Mexicano had a wholly-owned subsidiary, Almacenadora Somex, S.A. ("Somex"), that operated coffee storage and warehousing facilities in Mexico. Albany insured three

companies ("the subrogors") in a financing agreement with Carlos Zardain and Cafetelera Zardain S.A. de C.V. (collectively "Zardain").

As security for the financing, Zardain gave the subrogors four loan notes. Each note granted the subrogors a lien on the goods indicated in a corresponding warehouse receipt — issued by Somex — for Mexican coffee beans owned by Zardain and stored in Somex's Mexican warehouses. The receipts indicated the type, quantity, and quality of the coffee. Each loan note also included a forum selection clause that provides, in Spanish, that "[i]n order to resolve any matter related to this instrument, the interested parties agree to submit to the tribunals of the City of Mexico, renouncing any other forum that corresponds or may correspond to them."

According to Albany, who is suing as subrogee and hence "in the shoes" of the subrogors, the subrogors demanded delivery of the coffee in November 1990 upon Zardain's default. Banco Mexicano and Somex refused, claiming that the coffee was lost or damaged. The day after the rebuffed demand, the subrogors and Banco Mexicano settled the dispute for considerably less than the value of the coffee characterized in the warehouse receipts.

Albany filed suit in the Southern District of New York in December 1990. Its complaint alleges causes of action based on breach of contract, negligence, wrongful conversion, fraud, and tortious interference with contractual relations. Albany contends that Banco Mexicano coerced the subrogors — and, by extension, Albany — into accepting

the settlement by misrepresenting Somex's ability to deliver the coffee described in the receipts and by threatening to put Somex into bankruptcy if the subrogors did not agree to the settlement.

Banco Mexicano moved to dismiss the complaint for improper venue, based on the forum selection clause in the loan notes. The district court granted the motion. *See Albany Ins. Co. v. Banco Mexicano, S.A.*, No. 96 Civ. 9473, 1998 WL 730337, at *6 (S.D.N.Y. Oct. 19, 1998). Albany appeals.

II. DISCUSSION

A. Standard of Review

As an initial matter, the parties disagree as to the standard of review that we should employ in evaluating the substance of the district court's decision.[1] Albany, which points out that we generally give no deference to a district court's decision to dismiss a complaint pursuant to Rule 12, *see, e.g.*, *Morelli v. Cedel*, 141 F.3d 39, 41 (2d Cir. 1998) (Rule 12(b)(1)); *Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991) (Rule 12(b)(6)), urges us to review the ruling *de novo*. Banco Mexicano, on the other hand, highlights the fact that venue determinations are usually reversed only when the district court has exceeded its discretion, *see, e.g.*, *Publicker Indus. v. United States* (*In re Cuyahoga Equip. Corp.*), 980 F.2d 110, 116-17 (2d Cir.

1. There can be no doubt as to the standard by which we review Albany's *procedural* objections, which we will not upset absent a finding that the district court abused its discretion. *See infra* Part II.D.

1992), and it asserts that an abuse of discretion standard should therefore apply. We need not resolve the issue of which standard of review is appropriate, however, because the district court's decision would be entitled to affirmance under either a *de novo* or an abuse of discretion standard.

B. Applicability of Forum Selection Clause

The district court found that the forum selection clause on the loan note that Zardain gave the subrogors applied to Albany's suit and therefore prevented Albany from bringing this action in a court located elsewhere than Mexico City. *See Albany Ins. Co.*, 1998 WL 730337, at *2-*6. On appeal, Albany contends that the clause is not applicable because (1) its claim neither relates to nor seeks enforcement of the contract between Zardain and Albany's subrogors; (2) the forum selection clause on the loan notes does not apply to disputes arising out of the warehouse receipts; and (3) Banco Mexicano is not a party either to the warehouse receipts or to the loan notes. None of these arguments succeed.

Albany's claims that its suit does not relate to the subrogor's contract with Somex and does not seek enforcement or interpretation of either the warehouse receipts or the loan notes is belied by the fact that its complaint is replete with references to the receipts. In fact, as the district court found, *see id.* at *5, the complaint places the receipts at the core of the dispute between the parties; it alleges that Somex failed to perform its obligation to deliver the coffee described on the receipts and that, after Somex reneged on that duty, Banco Mexicano and Somex coerced a settlement from the subrogors by misrepresenting Somex's ability to meet its contractual commitment.

Appendix A

The question of whether the forum selection clause, which appears on the loan notes, applies to all disputes arising out of the contract between the subrogors and Somex — including those concerning the warehouse receipts — presents a different issue. The language of the forum selection clause either provides that it applies to "any question relative to this instrument" or to "any matter related to this instrument," depending on the translation. The district court found that the loan notes and the warehouse receipts together formed an integrated contract, so that, under either of the two interpretations, the forum selection clause applied to Albany's claims under the receipts. *See id.* at *2. We agree. In particular, we note that the terms of the loan notes specify that Somex issued each loan note simultaneously with a warehouse receipt that had an identical identification number and that presentation of both a loan note and its corresponding receipt would — with a limited exception — be necessary to obtain delivery of the goods specified on the receipt.

As for Albany's contention that Banco Mexicano has no right to assert the forum selection clause because it did not issue the loan notes or receipts, we concur in the district court's ruling that Albany "may not use the contracts as a sword without also permitting Banco's use of the contracts' shields." *Id.* at *3. The district court found, and we have affirmed, that Albany, despite its pleas to the contrary, is suing Banco Mexicano based on the contractual relationship between Albany's subrogors and Somex. This precludes Albany from saying, at the same time, that Banco Mexicano cannot avail itself of the contract's provisions.

Accordingly, we conclude that the forum selection clause unambiguously encompasses Albany's suit.

C. Enforceability of the Forum Selection Clause

Albany's appeal also reiterates its argument, made before the district court, that enforcing the forum clause and forcing it to pursue its claims in a Mexican court would be unreasonable and unjust. There is a strong presumption in favor of the validity of international forum selection clauses, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985), and the party objecting to such a clause "bears a heavy burden," *New Moon Shipping Co. v. Man B&W Diesel AG*, 121 F.3d 24, 32 (2d Cir. 1997). We agree with the district court that Albany's burden has not been met in this case.[2]

D. Alleged Procedural Improprieties

Albany argues that the district court exceeded its authority in granting Banco Mexicano's motion to dismiss because in doing so the court (1) relied on new arguments that Banco Mexicano submitted in a reply memorandum and corresponding affidavit; (2) relied on unauthenticated documents, testimony made without personal knowledge, and inadmissible hearsay; and (3) did not grant Albany an opportunity to contest Banco Mexicano's factual allegations through additional discovery or sur-reply papers. We review

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2. Albany cited two cases — one unpublished case in which service of process allegedly took over one year for a Mexican court to accomplish and one case in which Banco Mexicano, acting in concert with Mexican authorities, allegedly coerced and imprisoned a business enemy, *see Argueta v. Banco Mexicano*, 87 F.3d 320, 321-23 (9th Cir. 1996). But we cannot extrapolate from those unfortunate instances to wholesale rejection of Mexico as a forum.

the district court's actions with respect to each of these objections for abuse of discretion. *See Quaratino v. Tiffany & Co.*, 71 F.3d 58, 66 (2d Cir. 1995) (denial of motion to file additional papers); *Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) (denial of request for additional discovery); *New Haven Radio, Inc. v. Meister (In re Martin-Trigona)*, 760 F.2d 1334, 1344 (2d Cir. 1985) (evidentiary ruling).

Albany's contention that Banco Mexicano "changed the entire ground" of its motion to dismiss mischaracterizes the record. In its initial submissions accompanying its motion to dismiss, Banco Mexicano included copies of the warehouse receipts and loan notes, which are in Spanish, and an English translation of the forum selection clause that it asserted was in the receipt. In its memorandum in opposition to the motion, Albany argued, *inter alia*, that the receipts did not contain the forum selection clause and that the "separate document" (the loan notes) that did include the clause did not apply to Albany's suit. In reply, Banco Mexicano offered an affidavit from its Mexican counsel in which he corrected Banco Mexicano's earlier mistake by stating that the forum selection clause was in fact part of the loan notes rather than the receipts themselves and explained that the loan notes and receipts were issued together as part of the same transaction. Thus, Banco Mexicano's reply papers did not change the grounds for its motion to dismiss, but rather simply clarified the location of the forum selection clauses. And Albany's claim that it was prejudiced by Banco Mexicano's mistake is contradicted by the facts that it knew that the forum selection clause was part of the loan notes and that it argued in its opposition papers that the loan notes were inapplicable. The district court noted Albany's

contention and correctly rejected it in its decision. *See Albany Ins. Co.*, 1998 WL 730337, at *2.

We similarly find no merit in Albany's argument that the district court impermissibly relied on inadmissible evidence in the affidavits and documents submitted by Banco Mexicano. It is true (1) that the affidavit of Banco Mexicano's counsel for this case, included in the initial motion papers, did not assert that its representations were based on the affiant's personal knowledge and arguably did not properly authenticate the warehouse receipts and loan notes attached as an exhibit to the affidavit; (2) that Albany's opposition papers objected that Banco Mexicano had not properly authenticated the receipts and notes; and (3) that the district court cited this flawed affidavit in its decision. But the district court primarily relied on the reply affidavit of Banco Mexicano's Mexican counsel, which did assert personal knowledge of its stated facts and did claim that the receipts and loan notes that it attached were true copies of those issued by Somex to the subrogors. Since Banco Mexicano's initial affidavit was not necessary to the district court's decision, any evidentiary defect in the affidavit is harmless. *Cf. Tropea v. Shell Oil Co.*, 307 F.2d 757, 763 (2d Cir. 1962) (holding that the admission of testimony, even if improper, did not require reversal because the testimony was cumulative of other admissible evidence). And Albany's objections to the admissibility of the reply affidavit were waived by its failure to seek a motion to strike the affidavit on these grounds in the district court.[3] *See* Fed. R. Evid. 103(a)(1).

---

3. Albany did ask the district court to strike the affidavits on another ground — that they raised issues that were "not responsive to plaintiff's answering papers," an argument that we reject above.

Finally, with regard to Albany's assertion that it was denied an opportunity to contest Banco Mexicano's factual allegations through additional discovery or sur-reply papers, we find no abuse of the district court's discretion. We further note that Albany has not identified any argument that it was prevented from making; any of Banco Mexicano's factual allegations that it could have, but was impeded from, rebutting; or any evidence that it was barred from introducing before the district court.

III. CONCLUSION

Having carefully reviewed the record and examined each of Albany's arguments, we order that the district court's order of judgment be AFFIRMED.

For the Court,

KAREN GREVE MILTON
Acting Clerk

by: s/ Lucille Carr

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED OCTOBER 14, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 9473 (DAB)

ALBANY INSURANCE COMPANY,

Plaintiff,

– against –

BANCO MEXICANO, S.A.,

Defendant.

MEMORANDUM AND ORDER

* * *

DEBORAH A. BATTS, United States District Judge.

Albany Insurance Company ("Plaintiff") filed this suit seeking monetary relief from Banco Mexicano, S.A. ("Defendant") for claims relating to warehousing contracts. Defendant moves to dismiss the Complaint pursuant to Fed. R. Civ. P. Rules 12(b)(3) and 12(h)(1) for improper venue based on a forum selection clause. For the following reasons, Defendant's Motion to Dismiss is granted.

Appendix B

I. BACKGROUND

This action concerns the rights of parties to certain purchase transactions for green Mexican coffee beans. Defendant is a banking organization domiciled in Mexico, and at the time of the events, had a wholly-owned subsidiary called Almacenadora Somex, S.A. ("Somex"). (Karlinsky Aff. ¶ 2.) Somex was also incorporated under Mexican law, and it operated coffee storage and warehousing facilities in Mexico. (*Id.*)

Plaintiff, an insurance corporation existing under New York law, insured three companies — Coffee Trade Services, Inc. ("CTS"), Contitrade Services Corporation ("Contitrade"), and Continental Grain Co. ("Contigrain") (collectively "the subrogors") — in their purchase of Mexican green coffee beans from Carlos Zardain and Cafetelera Zardain S.A. de C.V. (collectively "Zardain"). (Compl. ¶ 9.) Zardain, in consideration of the financing by Albany's three subrogors, agreed to present the subrogors with negotiable warehouse receipts for green coffee stored in Mexican warehouses. (Compl. ¶ 10.)

Zardain presented the subrogors with negotiable warehouse receipts for a total of 10,750 bags of green coffee, issued by Somex. (Compl. ¶¶ 7, 12.) The receipts, issued by Somex in Spanish, indicated the type, quantity, and quality of coffee which Zardain had deposited in Somex's warehouses in Mexico on behalf of Albany's subrogors. (Karlinsky Aff. Ex. A.)

Each of the four warehouse receipts was accompanied by a loan note. (Perez Rios Aguilar Aff. Ex. A. Loan Note

¶1.) Each loan note bears the same serial number as its corresponding warehouse receipt. (*Id.*) Each set of documents was signed at the same time. (Karlinsky Aff. Ex. A.) Each receipt references its corresponding loan note, and vice versa. (Perez Rios Aguilar Aff. Ex. A. Loan Note ¶ 1; Warehouse Receipt ¶ 15.) The coffee identified in each warehouse receipt could only be claimed by presenting both the warehouse receipt and its corresponding loan note. (*Id.* Loan Note ¶ 3; Warehouse Receipt ¶ 15.)

Each loan note includes a forum selection clause which provides: "In order to resolve any matter related to this instrument, the interested parties agree to submit to the tribunals of the City of Mexico, renouncing any other forum that corresponds or may correspond to them."[1] (Karlinksy Aff. ¶ 6.)

Plaintiff alleges that on or about November 27, 1990, in Mexico City, its subrogors demanded delivery of the coffee. (Compl. ¶¶ 14-15, 28.) Plaintiff alleges that Defendant and Somex refused to deliver the coffee because the coffee "was short or missing from the warehouses . . ., and/or was not of the same good condition and quality as when delivered . . . ." (Compl. ¶ 16.)

---

1. Albany did not attach copies of the warehouse receipts or loan notes to its Complaint. However, Banco attached copies of the original Spanish-language documents to its motion to dismiss, and also provided an English translation of the forum selection clause. (Karlinsky Aff. Ex. A; *Id.* ¶ 6.) Banco later provided a complete translation of the documents, including a slightly different translation of the forum selection clause. (Karlinsky Aff. ¶ 6; Perez Rios Aguilar Aff. Ex. A, Loan Note ¶ 11.) To the Court's knowledge, Albany does not contest the accuracy of either translation.

Appendix B

Plaintiff alleges that on or about November 28, 1990, still in Mexico City, Defendant negotiated with Plaintiff's subrogors to settle the outstanding warehouse receipts and loan notes. (Compl. ¶¶ 27-36.) Defendant and Somex allegedly offered a settlement package worth less than 40% of the coffee identified in the warehouse receipts. (*Id.* ¶ 29.) Defendant allegedly threatened to distribute Somex's resources to other creditors and to place Somex in bankruptcy if Plaintiff's subrogors refused the settlement offer. (*Id.*) Plaintiff alleges that its subrogors relied on these representations and accepted the settlement offer. (*Id.* ¶¶ 30-31.)

Plaintiff filed suit in the Southern District of New York seeking damages for breach of contract, negligence, wrongful conversion, fraud, and tortious interference with contractual relations, as well as punitive damages. (*Id.* ¶¶ 17, 21, 24, 31, 39, 42.) Plaintiff alleges that Defendant fraudulently understated the quantity and quality of coffee available in the Somex warehouses, and that Defendant never intended to place Somex into bankruptcy, as it had represented in the settlement negotiations in Mexico City. (*Id.* ¶ 32.)

Defendant now moves to dismiss the Complaint for improper venue, arguing that the forum selection clause appearing in the loan notes locates jurisdiction and venue exclusively in the tribunals of Mexico City, Mexico. (Def.'s Mem. Law at 1.)

Appendix B

II. DISCUSSION

A. Existence of a Forum Selection Clause

The parties dispute the existence and applicability of the forum selection clause appearing in the loan notes. Plaintiff contends that because the forum selection clause only appears on the loan note, and not on the warehouse receipt, the clause has no application to the matter at hand. (Pl.'s Mem. Opp'n Mot. Dismiss at 3.) The Court, therefore, must first determine whether the loan note and the warehouse receipt form an integrated contract to which both parties are bound.

1. *Integrated Contracts*

Under New York law, several documents form one integrated agreement when they are executed contemporaneously as part of the same transaction. *See Carvel Corp. v. Diversified Management Group, Inc.*, 930 F.2d 228, 233 (2d Cir. 1991) (applying New York law to conclude "instruments executed at the same time, by the same parties, for the same purpose and in the course of the same transaction will be read and interpreted together").

In the present case, the loan notes and the warehouse receipts were executed and signed by the same parties on the same date. Each loan note bears the same serial number as its corresponding warehouse receipt and each document in a set references the other. Moreover, both documents must be surrendered in order to collect the coffee identified in the receipt. Accordingly, this Court finds that the loan notes and the warehouse receipts form one integrated contract. As

integrated agreements, the forum selection clause which appears in the loan notes applies to a suit upon the corresponding warehouse receipts. *Greene's Ready Mix v. Fillmore Pacific Associates*, 808 F.Supp. 307, 310 (S.D.N.Y. 1992) (holding that forum selection clause contained in one document applied to another document executed contemporaneously as part of the same transaction).

2. *Parties to the Contracts*

Neither Albany nor Banco is a party to the contracts sued upon. Instead, the contracts were entered into by Albany's subrogors and Banco's subsidiary. It is well settled that a subrogee "stands in the shoes" of its subrogors and succeeds to the subrogors' contractual rights. *Farrell Lines Inc. v. Columbus Cello-Poly Corp.*, No. 96 Civ. 5250, 1997 WL 570494, at *6 (S.D.N.Y. Sep. 15, 1997) (enforcing forum selection clause of subrogor's contract in suit by subrogee). To the extent that Plaintiff's subrogors would be bound by the forum selection clause, Plaintiff also must be bound by the clause.

Defendant may assert the contracts' forum selection clause, even though it is a non-party to the contracts, because it is being forced to defend against contract claims. Defendant may not use the contracts as a sword without also permitting Banco's use of the contracts' shields. *See, e.g., Tepper Realty Co. v. Mosaic Tile Co.*, 259 F.Supp. 688, 692 (S.D.N.Y. 1966) (holding that plaintiffs "cannot rely on the contract when it works to their advantage, and repudiate it when it works to their disadvantage").

Appendix B

B. Enforceability of the Forum Selection Clause

The forum selection clause exists in the contract and is available to Banco as a defense to suit. However, even though the clause is validly raised as a defense, it might not act to compel dismissal from the Southern District of New York. The Court must determine whether the clause locates jurisdiction and venue exclusively in Mexico City, whether any exceptions to enforcement of the clause exist, and whether the instant claims fall within the scope of the forum selection clause.

1. *Exclusive Nature of the Clause*

A forum selection clause may be either permissive or exclusive. An exclusive or mandatory forum selection clause revokes jurisdiction from all forums except those specifically identified in the clause, and must be enforced. *See John Boutari & Sons, Wines and Spirits, S.A. v. Attiki Importers and Distribs.*, 22 F.3d 51, 53 (2d Cir. 1994). An exclusive clause is created by the addition of any language clearly narrowing jurisdiction and venue exclusively to the identified forum. *Id.* at 52 (citing *Docksider, Ltd. v. Sea Technology, Ltd.*, 875 F.2d 762, 764 (9th Cir. 1989) (requiring "some further language indicating the parties' intent to make jurisdiction exclusive")).

The forum selection clause appearing in the agreements is exclusive. The clause specifies, "[i]n order to resolve any matter related to this instrument, the interested parties agree to submit to the tribunals of the City of Mexico, renouncing any other forum that corresponds or may correspond to

them." (Karlinsky Aff. ¶ 6.) The final phrase defines the clause as exclusive by renouncing venue in all other forums. Very similar terms, also from a Spanish-language contract, have been interpreted as an exclusive forum selection clause in this District. *See Argonaut Partnership, L.P. v. Bankers Trustee Co.*, Nos. 96 Civ. 1970, 96 Civ. 2222, 1997 WL 45521 at *13 (S.D.N.Y. Feb. 4, 1997) (finding as mandatory a clause identifying the available forums and "waiving any other jurisdiction that might correspond" to the parties). The language of the instant forum selection clause clearly provides for jurisdiction in Mexico City at the exclusion of all other forums, including the Southern District of New York. If it is enforceable and applicable to Albany's specific claims for relief, the clause requires that this dispute be heard in Mexico City.

2. *Presumption of Validity*

In disputes where the underlying transaction is fundamentally international, the Supreme Court has indicated that forum selection clauses are presumptively valid and should be enforced unless enforcement is "unreasonable" under the circumstances. *See M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9-10 (1972); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir. 1993). The Court has enumerated four situations where a forum selection clause could be considered unreasonable: (1) if its incorporation into the agreement was the result of fraud or overreaching; (2) if the party " 'will for all practical purposes be deprived of his day in court,' due to the grave inconvenience or unfairness of the selected forum"; (3) if the plaintiff will be denied a remedy because of fundamental unfairness of the

chosen law; and (4) if the forum selection clause "contravene[s] a strong public policy of the forum state". *See Roby*, 996 F.2d at 1363 (citing *Bremen* and *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991)). The party objecting to the forum selection clause bears a heavy burden of showing the clause's unreasonableness. *See New Moon Shipping Co. v. Man B & W Diesel AG*, 121 F.3d 24, 32 (2d Cir. 1997).

Plaintiff argues that enforcement of the forum selection clause would deny it its day in court, and asserts two justifications for this conclusion. (Pl.'s Mem. Opp'n Mot. Dismiss at 8.) First, Plaintiff suggests it would experience undue delay in a legal system which took more than a year to accomplish service in a separate case involving coffee losses at Somex warehouses. *Id.* Second, Plaintiff questions the integrity of the Mexican judicial system, and specifically alleges that Defendant has exercised "abusive and corrupting influence" in the past. *Id.*

Neither argument is compelling. First, as the Second Circuit has indicated, "it is not enough that the foreign law or procedure merely be different or less favorable than that of the United States." *Roby*, 996 F.2d at 1363. The service of process may have been slower in a separate Mexican case, but, by Plaintiff's own admission, process was actually served and the delay did not deprive the plaintiff in that case of a remedy. This Court cannot conclude from one Mexican case — where process was ultimately served — that a forum selection clause must be rejected merely because it grants exclusive jurisdiction to the tribunals of Mexico City. Second, Plaintiff does not support its allegations of abuse

and corruption. Against these mere allegations must be balanced the Supreme Court's clear instructions that international forum selection clauses be accorded great deference. *See Bremen*, 407 U.S. at 9 ("We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts."); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985) (stating that international comity heavily favors enforcement of forum selection clauses). Because Plaintiff has failed to demonstrate the "unreasonableness" of the forum selection clause, this Court finds that the clause is valid.

3. *Scope*

The Court must next determine whether the forum selection clause applies to Plaintiff's claims against Defendant. Plaintiff contends that its claims against Defendant do not arise under the contract, and are, therefore, beyond the scope of the forum selection clause. (Pl.'s Mem. Opp'n Mot. Dismiss at 5.) The clause appearing in the loan notes applies to "any matter related to this instrument". (Karlinsky Aff. ¶ 6.) Plaintiff's first cause of action, for breach of contract, would be covered by the clause.

Plaintiff's remaining claims — for negligence, wrongful conversion, fraud, tortious interference, and punitive damages — however, sound in tort. Tort claims can also be governed by forum selection clauses. *See Bison Pulp & Paper Ltd. v. M/V Pergamos*, No. 89 Civ 1392, 1995 WL 880775 at *15 (S.D.N.Y. Nov. 29, 1995). Whether tort claims fall within the scope of a contract's forum selection clause

depends on "whether resolution of the claims relates to interpretation of the contract." *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509, 514 (9th Cir. 1988).

Plaintiff's claims for negligence, conversion, and tortious interference with contractual relations all relate directly to interpretation of the contract. Plaintiff's negligence claim presumes that the contracts have established a duty of care. Similarly, Plaintiff's conversion claim presumes that the contracts have conferred ownership of the warehoused coffee to Plaintiff's subrogors. Finally, Plaintiff's tortious interference claim presumes the existence of contract relations. Interpreting the contracts is a prerequisite to determining any of these tort claims, and thus each is covered by the forum selection clause appearing in the agreements. *Manetti-Farrow, Inc.*, 858 F.2d at 514.

Plaintiff objects most strenuously to including its fraud claim within the scope of the forum selection clause. Albany argues that this claim can be settled without reference to the coffee warehousing agreements. (Pl's Mem. Opp'n Mot. Dismiss at 6.) However, Albany specifically alleges that representatives of Banco and Somex fraudulently misrepresented the availability of the coffee described in the contracts, and offered a cash settlement "in substitution for the subject coffee" identified in the warehouse receipts and in exchange for surrendering the receipts. (Compl. ¶ 29.) Determining whether these representations and transactions were fraudulent will necessarily require an interpretation of the type, quantity, and quality of coffee identified in the warehouse receipts.

Albany's remaining tort claim, for punitive damages, rests on Banco's liability for the preceding tort claims. Because resolution of Plaintiff's tort claims relates to the interpretation of the contract, this Court finds that the tort claims are within the scope of the forum selection clause.

C. Defendant's Alleged Waiver of a Venue-Based Objection

Throughout its papers, Plaintiff suggests that Defendant has submitted to the venue of the U.S. federal courts and, thereby, waived its rights under the forum selection clause. Plaintiff cites two circumstances to support its argument: 1) that Defendant testified in a similar case tried in the Southern District of New York, and 2) that, in a separate case, Defendant's subsidiary, Somex, submitted to the United States courts in Texas. (Pl.'s Mem. Opp'n Mot. Dismiss at 8.) This Court finds that neither circumstance operates as a waiver of Defendant's right to enforce the forum selection clause.

Plaintiff does not submit, and this Court is not aware of, any authority to support Plaintiff's proposition that testifying in a separate case precludes a party from enforcing a forum selection clause. Nor does the Court accept Plaintiff's suggestion that Defendant's subsidiary, Somex, has submitted to United States courts in Texas. To support this argument, Plaintiff submitted a Fifth Circuit decision in *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d 907 (5th Cir. 1993) and an unpublished order from the Texas District court on remand in that same case.

Neither of these cases, however, is applicable to the present case. The Fifth Circuit decision held that Somex

could not raise a venue objection based on its forum-selection clause after failing to raise it in its first motion to dismiss on *forum non conveniens*. *Albany Ins. Co. v. Almacenadora Somex, S.A.*, 5 F.3d at 909-910. On remand, the District court denied a motion to dismiss made by Somex on the grounds of lack of personal jurisdiction and *forum non conveniens*. In the present case, Defendant properly filed a motion to dismiss based on a forum selection clause. Accordingly, neither decision precludes Defendant from enforcing the forum selection clause in this action.

III. CONCLUSION

Defendant's Motion to Dismiss for improper venue is GRANTED. The Clerk is ordered to close the docket in this matter.

SO ORDERED.

Dated: New York, New York
October 14, 1998

s/ Deborah A. Batts
Deborah A. Batts
U.S.D.J.

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AND FILED OCTOBER 21, 1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 CIVIL 9473 (DAB)

ALBANY INSURANCE COMPANY

Plaintiffs,

BANCO MEXICO, S.A.,

Defendant.

JUDGMENT

Defendant having moved this Court for an order of dismissal of the Complaint pursuant to FRCP 12(b)(3), and the matter having come before the-Honorable Deborah A. Batts, United States District Judge, who on the 14th day of October 1998 having issued her Memorandum and Order granting defendant's motion to dismiss the Complaint, it is,

ORDERED, ADJUDGED AND DECREED, That defendant's motion to dismiss the complaint is granted for the reasons stated in the Court's Memorandum and Order dated October 14, 1998; accordingly, this case is closed.

Appendix C

DATED: **JAMES M PARKISON**

October 21, 1998 **CLERK**

s/ James F. Parkison
(By) Deputy Clerk

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AUGUST 18, 1999

UNITED STATES COURT OF APPEALS
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 18th day of August one thousand nine hundred and ninety-nine.

Dkt No: 98-9531

Albany Insurance Co.

Plaintiff-Appellant,

v

Banco Mexicano, S.A.

Defendant-Appellee.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Albany Insurance Co.

Appendix D

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
Karen Greve Milton,
Acting Clerk

By s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

No. 99-847

IN THE

Supreme Court of the United States

ALBANY INSURANCE COMPANY,

Petitioner,

v.

BANCO SANTANDER MEXICANO, S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Parties to the Proceeding (Rule 14.1(b))

The petition accurately lists the original parties to the proceedings below, but does not accurately list the parties as they exist today. Banco Mexicano, S.A. no longer exists. Banco Santander Mexicano, S.A., named as respondent in the caption of this brief in opposition, is the successor by corporate merger to Banco Mexicano, S.A.

Corporate Disclosure Statement (Rule 29.6)

Respondent Banco Santander Mexicano, S.A. is a subsidiary of Banco Santander Grupo, S.A., a publicly-owned holding and banking company domiciled in Spain. Banco Santander Mexicano, S.A. has no other publicly-owned corporate parents, and has no publicly-owned subsidiaries or affiliates. As noted in the foregoing Rule 14.1(b) statement, the original named respondent in this proceeding, Banco Mexicano, S.A., has been merged out of existence, and Banco Santander Mexicano, S.A. is its successor.

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STATEMENT OF THE CASE

Respondent Banco Santander Mexicano, S.A. ("BancoMex") submits this brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit of petitioner Albany Insurance Company ("Albany"). Albany seeks the writ to review a judgment affirming the dismissal of its complaint on the basis of contractual international forum selection clauses. Those clauses commit disputes relating to the subject matter of this case to the courts of Mexico. The lower courts correctly held the forum clauses applicable to the parties and claims asserted in this case, correctly decided that their enforcement would be neither "unreasonable" nor "unjust," and correctly applied them in dismissing Albany's complaint. Their decisions comport with well settled rules of contract interpretation, and properly reflect the deference owed to such clauses, a deference mandated by this Court in *M/S Bremen v. Zapata Off Shore Co.*, 407 U.S. 1, 17-18 (1972), and no longer subject to any serious dispute.

While Albany seeks to avoid the application of these settled principles of contract law and civil procedure to its complaint, its petition neither specifies nor even alludes to *any* conflict (much less an important one) between the decision of the court of appeals here and any decision of this Court, or between decisions of the circuit courts, that requires this Court's intervention. Similarly, the petition raises no serious and substantial question of federal law, or one relating to the administration of justice, that would mandate issuance of the writ. The petition should be denied.

A. The Facts.

Albany is a New York property and casualty insurer. BancoMex is a Mexican bank. A wholly-owned subsidiary of BancoMex, Almacenadora Somex, S.A. ("Somex"), operated coffee bean storage and warehousing facilities in Mexico. Albany insured Coffee Trade Services, Inc., Contitrade Services Corporation, and

Continental Grain Co. (collectively, the "Insureds"), coffee traders or brokers that deposited coffee in the Somex warehouses in Mexico. Alleging that it had paid its Insureds' claims for missing or damaged coffee in the Somex warehouses (Albany was thus subrogated to the Insureds' rights), Albany sought to recover those losses from BancoMex, Somex's parent. (App. 12a)

On the receipt of coffee in its warehouses, Somex issued negotiable warehouse instruments ("Warehouse Receipts"). Each Warehouse Receipt consists of (1) a receipt endorsed with the words "note for loan" ("bono de prendo" in the Spanish), (2) a document entitled "Provisions Governing the Use of Notes for Loans Against Goods in Warehouse," and (3) a document entitled "General Conditions of the Warehouse Receipt." By issuing a Warehouse Receipt, Somex warranted that it would have a stipulated quantity of green coffee beans in its warehouse when demand was made. (App. 12a-13a) The three parts of a Warehouse Receipt are physically attached to each other, are issued and executed simultaneously, refer to each other, and must be presented together to release stored coffee. (App. 15a-16a)

Somex issued the Warehouse Receipts that underlie *this* dispute to Cafetalera Zardain Hermanos, S.A. de C.V. ("Zardain"), but in favor of Albany's Insureds, for whom Zardain acted as agent. Accordingly, the Insureds' rights in the coffee held in Somex's warehouses derive from the Warehouse Receipts. (App. 2a-3a) Each Warehouse Receipt contains a forum selection clause providing, in Spanish, that: "[i]n order to resolve any matter related to this instrument, the interested parties agree to submit to the tribunals of the City of Mexico, renouncing any other forum that corresponds or that may correspond to them." (App. 3a)

Albany alleged in this case that its Insureds demanded delivery of coffee, and that Somex breached its contract obligations by failing to deliver the coffee or by making short deliveries or delivering damaged coffee. Albany asserted a contract claim against

BancoMex arising from the Somex/Insureds contract; tort claims against BancoMex for negligence, conversion, fraud, civil conspiracy, and tortious interference with contract (on the same facts alleged to give rise to the contract claim); and claims that BancoMex is liable for the obligations of its subsidiary Somex under theories of *alter ego* liability and veil piercing liability. (App. 20a-22a) All of the claims arise under state or common law.

B. Course of Proceedings Below.

Albany filed its complaint in the district court on December 17, 1996. It invoked the alienage jurisdiction of the district court under 28 U.S.C. § 1332(a)(2). BancoMex filed an answer and affirmative defenses on February 20, 1997, including an affirmative defense of improper venue in the Southern Judicial District of New York. Albany served certain discovery requests, and BancoMex served responses and objections. While contending that BancoMex's responses were inadequate, Albany failed to move to compel discovery.

By notice of motion dated July 14, 1997, BancoMex moved to dismiss the complaint, pursuant to Fed. R. Civ. P. 12(b)(3) and 12(h)(1), for improper venue based on the forum selection clauses. Albany opposed the motion with its counsel's affidavit accompanied by a memorandum of law, but did not request an evidentiary hearing or seek any relief to secure or place before the district court *evidence* that would contradict BancoMex's factual arguments. Similarly, it did not move to strike matter submitted by Albany that it deemed objectionable. By memorandum opinion and order dated October 14, 1998, the district court granted the motion to dismiss. The court entered judgment on October 21, 1998, and Albany filed a timely notice of appeal from that judgment on November 16, 1998. The decision of the district court is not officially reported, but is found in *Westlaw* at 1998 WL 730337 (S.D.N.Y. October 19, 1998)(Batts, D.J.). (App. 11a)

By summary order dated July 2, 1999, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment. The summary order is not reported, but is referred to at 182 F.3d 898 (2d Cir. 1999)(table)(Calabresi, C.J., presiding). (App. 1a) Albany timely moved for rehearing *en banc* before the court of appeals. By order dated August 18, 1999, the court of appeals denied that motion without dissent. (App. 26a) Albany filed its petition for a writ of certiorari on November 16, 1999. This Court has jurisdiction over the petition pursuant to 28 U.S.C. § 1254(1).

C. The Memorandum Opinion and Order of the District Court.

The district court divided its analysis of Albany's arguments against enforcement of the forum selection clauses in two parts. *First*, the court considered whether the Warehouse Receipts ("Certificados") and corresponding loan notes ("Bonos") issued by Somex constituted an integrated contract that was binding on Albany. (App. 15a-16a) New York law holds that documents executed contemporaneously are deemed part of the same transaction. The court noted that both the Bonos and the Certificados had not only been issued and executed together, but also had to be surrendered together in order to redeem the coffee identified therein. Moreover, each Certificado bore the same serial number as its corresponding Bono, and both documents expressly referred to one another. (*id.*)

Accordingly, the district court found that the Certificados and the Bonos were parts of an integrated contract, so that the forum selection clauses appearing in the latter were applicable to a suit upon the former. (App. 16a) Similarly, Albany, which as a subrogee stood "in the shoes" of its Insureds, the *de facto* parties to the contract, was bound by the forum selection clauses just as its subrogors were. (*Id.*) Finally, BancoMex, although not party to the contracts, could avail itself of their provisions, including the

forum selection clauses, because it was being forced to defend against Albany's contract-based claims. The district court rejected the contention that Albany's claims did not arise from the contracts, noting that its complaint specifically pleaded a contract claim and that its tort claims equally required the trier to interpret the contracts. (App.20a-22a)

Second, the district court examined (a) the application of the forum selection clauses contained in the Bonos to the myriad contract and tort claims asserted by Albany, and (b) the enforceability of the clauses. Reading the clauses literally, the court noted that their reach extended to all matters related to the contracts. (App. 20a) Given that all of Albany's varied tort claims were contingent upon the interpretation of the contracts, the court found that each such claim also was subject to the forum selection clauses set forth in the Bonos. (App. 20a-22a)

Giving due weight to this Court's mandate that forum selection clauses in international transactions are presumptively valid (*M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 17-18 (1972)), the court looked to whether enforcement of the clauses was unreasonable. (App. 18a-20a) In this connection, Albany challenged the integrity of the Mexican judicial system as an obstacle which, together with BancoMex's alleged influence in that judicial system, would preclude or significantly delay relief in the courts of Mexico. In the absence of any *facts* to support Albany's conclusory allegations, however ("[Albany] does not support its allegations of abuse and corruption" (App. 19a-20a)), the district court found that any potential delay engendered by suing in a foreign venue could neither hinder the application of otherwise valid forum selection clauses, nor render their enforcement "unreasonable." (*Id.*)

D. The Summary Order of the Circuit Court.

The circuit court reached the same conclusions. By summary, unpublished order, the circuit court rejected Albany's contentions that (a) the forum selection clauses did not apply to a suit arising from the Warehouse Receipts because the clauses appeared only in the Bonos, or loan notes, (b) the clauses were inapplicable because Albany's claims did not arise from the contracts between the Insureds and Somex, and (c) since BancoMex was not a party to either the Certificados or Bonos, it could not take advantage of the forum selection clauses. (App. 5a)

The circuit court noted that Albany's claim "that its suit does not relate to the subrogor's (sic) contract with Somex" was "belied by the fact that its complaint is replete with references to the [Warehouse Receipts]." (*Id.*) The court joined in the district court's observation that "the complaint places the receipts at the core of the dispute between the parties. . . ." (*Id.*) Reviewing the district court's determination that the two parts of the Warehouse Receipts "formed an integrated contract," the circuit court agreed. *Id.* The court noted that "Somex issued each loan note simultaneously with a warehouse receipt that had an identical identification number and that presentation of both a loan note and its corresponding receipt would . . . be necessary to obtain delivery of the [specified] goods. . . ." (App. 6a) Finally, with respect to the contention that BancoMex had no right to rely on the forum selection clauses because it issued neither the loan notes nor receipts, the circuit court "concur[red] in the district court's ruling that Albany 'may not use the contracts as a sword without also permitting [BancoMex's] use of the contracts' shields." (*Id.*) The circuit court concluded its analysis by stating, "[a]ccordingly, we conclude that the forum selection clause unambiguously encompasses Albany's suit." (*Id.*)

The circuit court next turned to the *enforceability* of the forum selection clauses. It rejected the contention that

enforcement would be "unreasonable and unjust," stating that it could not "extrapolate" from the "unfortunate instances" to which Albany pointed (a single, unrelated case in which a plaintiff *alleged* that BancoMex had engaged in inappropriate conduct in respect of the Mexican judicial system) to "wholesale rejection of Mexico as a forum." (App. 7a) Noting the "strong presumption in favor of the validity of international forum selection clauses (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*, 473 U.S. 614, 629 (1985)), and the "heavy burden" on the party objecting to such a clause (*New Moon Shipping Co. Ltd. v. Man B&W Diesel AG*, 121 F.3d 24, 32 (2d Cir. 1997)), the circuit court "agree[d] with the district court that Albany's burden has not been met in this case." (*Id.*)

Finally, the circuit court rejected Albany's contentions as to alleged "procedural improprieties." Specifically, the court held that the district court had not abused its discretion in "rel[ying] on new arguments . . . in a reply memorandum and . . . affidavit," in relying on allegedly improper or unauthenticated materials, and in refusing to grant Albany an opportunity to contest BancoMex's factual allegations through additional discovery or sur-reply papers. As to the first assertion, the circuit court noted that Albany's contention as to BancoMex's changing the ground of its argument "mischaracterizes the record." (App. 8a) As to the second argument, the circuit court noted that any reliance on inadmissible evidence was "harmless," and that Albany had failed to take appropriate steps in the district court to correct such deficiencies in any event. (*Id.*) As to the third argument, the circuit court simply found no abuse of discretion and noted that Albany had not, in any event, "identified any argument that it was prevented from making; . . . any . . . factual allegations that it could have, but was impeded from, rebutting; or any evidence that it was barred from introducing. . . ." (App. 10a) The circuit court affirmed, and entered judgment for BancoMex. Albany's subsequent petition for rehearing *en banc* was denied without dissent. (App. 26a-27a)

REASONS FOR DENYING THE WRIT

The petition's factbound claim that the courts below erred in enforcing the forum clauses does not warrant review by this Court. The decisions below were plainly correct applications of settled contract principles and federal procedural law. No serious conflict among the circuit courts or with a decision of this Court is urged in the petition. Nor is there any serious departure from the accepted and usual course of judicial proceedings that would warrant this Court's attention, or any important question of federal law that should be settled by this Court.

1. Since this Court's decision in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), it has been axiomatic that courts must strictly enforce international forum selection clauses. They are prima facie valid; the party who seeks to avoid their application bears the heavy burden of establishing the existence of a highly compelling reason to override the agreement of the parties as to forum. *Id.* at 17-18. As this Court stated in *M/S Bremen*, international forum selection clauses must be enforced unless "trial in the contractual forum will be so gravely difficult and inconvenient that [the plaintiff] will for all practicable purposes be deprived of his day in court." *Id. See also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (enforcing forum selection clause). This case presents no reason either to reexamine or to depart from these well settled rules of civil procedure, rules that form an essential part of the system of international commerce and world trade.[1]

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[1] In appealing to xenophobic tendencies and narrow-minded parochialism (the decisions of the lower courts "deprived an *American* plaintiff of its day in its *own* court")(Petition at 9)(emphasis added), Albany would have this Court reverse not only *M/S Bremen*, but also thirty years of effective international adjudication of disputes arising in international commerce.

2. To the extent the petition argues that enforcement of the forum selection clauses would be "unreasonable and unjust" (App. 7a), or result in a deprivation of Albany's "day in court," that is a factual argument that has been twice rejected in this case by the courts below. Moreover, this factual argument is a mere assertion that the lower courts erred, not that there is any fundamental and important conflict in federal law that requires this Court's intervention. Stated otherwise, and even assuming that the lower courts were wrong (they were not), it is axiomatic that an error in the application of a settled rule alone does not bring this case within the ambit of Supreme Court Rule 10. As that rule states, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *see Hubbard v. United States*, 514 U.S. 695, 720 (1995) ("A high degree of selectivity is . . . enjoined upon us in exercising our certiorari jurisdiction. . . . [O]rdinarily a court of appeals decision interpreting one of our precedents — even one deemed to be arguably inconsistent with it — will not be reviewed unless it conflicts with the decision of another court of appeals.") (Rehnquist, C.J., dissenting).[2]

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[2] Albany cites *Argueta v. Banco Mexicano*, S.A., 87 F.3d 320 (9th Cir. 1996), for the proposition that it would be "unreasonable and unjust" to require Albany to bring its claims in Mexico. (Petition at 24-25) Plaintiff in *Argueta* resisted a forum selection clause which was invoked by the same proponent as in this case, contending that the Mexican criminal justice system, and BancoMex's predecessor's alleged influence in that system, put him in fear of unjust prosecution and incarceration if he returned to Mexico. He argued that it would therefore be unreasonable and unjust to require him to litigate his civil claims in Mexico. *Id.* at 326-27. The court *enforced* that forum selection clause over plaintiff's objection, and made no adjudication with respect to plaintiff's assertions as to BancoMex's alleged influence or improper conduct. Albany's reliance on the case is therefore entirely misplaced. *Id.* at 327.

3. Likewise, and contrary to Albany's arguments, the decision of the court of appeals does not "distort" or improperly "extend" the rule enunciated by this Court in *M/S Bremen* (Petition at 10, 19), or "sanction an unreasonable and unjust departure from the accepted and usual course of judicial proceedings . . . established in" *M/S Bremen* (*id.* at 10-11). The district court and court of appeals decisions were neither novel nor surprising. Drawing on clear precedent and settled principles, these courts merely applied the law to the facts in a manner wholly consistent with *M/S Bremen*. Albany asserts in this connection that application of the forum choice clauses to non-parties to the contract was improper. As the court of appeals held, and as we point out below (*see infra* at 11-12), it was not — this result was well supported by the facts and by settled contract law. (App. 10a) Albany cites *Carnival Cruise Lines* for the proposition that before that case was decided this Court had not "define[d] precisely the circumstances that would make it unreasonable for a court to enforce a forum clause." *Carnival Cruise Lines*, 499 U.S. at 591. (Petition at 14) While that limited proposition is true, it is also true that the *Carnival* court *did* "refine" (499 U.S. at 593) the principle enunciated by *M/S Bremen*. Thus, and contrary to Albany's assertion, there is no need for this Court to "further refine" (Petition at 14) that principle.[1] Nor is this case an appropriate vehicle for such an undertaking, even if it were desirable — no such "further refinement" is suggested on the facts of this case; no clear, overriding principle emerges from this case that could provide future guidance to the courts of appeals and

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[1] In enforcing a forum selection clause, the *Carnival* court underscored the fact that the inquiry is a highly particularized factual one, dependent on the circumstances. Other than its citation to an inapposite case (*see* fn. 2, *supra*), Albany has failed to present *facts* that would make it "unreasonable" to enforce the forum selection clauses.

district courts. In sum, this is a garden-variety case that has ended where it should, after appropriate appellate review.

4. Albany further asserts that the district court's failure to order an evidentiary hearing to resolve what Albany alludes to as factual disputes was error. (Petition at 12-13) Yet Albany never requested an evidentiary hearing in the district court, and only belatedly argued in the court of appeals that binding precedent entitled it to one. Equally, Albany never controverted the facts set forth in BancoMex's motion, and even in this Court has failed to identify (a) any factual dispute that required such a hearing or (b) any disputed fact that was resolved against it without such a hearing. Albany contends that in relying on alleged new matter first presented to the district court in BancoMex's reply papers, the district court erred and Albany was unfairly prejudiced. (*E.g.*, Petition at 15-16) But, as the court of appeals held, Albany was *not* prejudiced by such reliance, if any, and has failed, despite thorough appellate review in the court of appeals, to suggest any argument that it could have made in the district court, yet was prevented from making. (App. 10a)

5. Nor do the decisions of the district court and the circuit court enunciate any new or novel rule of law, much less one in conflict with any decision of this Court or the decision of any other circuit court of appeal. Specifically, and contrary to Albany's claim (Petition at 9), neither lower court established any "rule" that non-signatories to a contract are bound by international forum selection clauses. Rather, both lower court decisions are grounded in the language of the contract clauses at issue, are solidly linked to the *facts* of *this* case (and in particular to the fact that Albany chose to sue on contracts with forum selection clauses), and simply apply existing precedent (and in particular well settled contract law and this Court's decision in *M/S Bremen*) to those facts. In the case at bar, the non-signatory Albany was bound to the presumptively valid international forum selection clauses

because it sued under the very contracts that contained those clauses. It was thus fair to enforce the forum selection clauses against it, and would have been *unfair* to deny BancoMex the right to rely on them.[4] Even assuming that this conclusion was wrong (it is not), that does not bring this case within the certiorari jurisdiction of the Court.[5]

6. There is no conflict between the decision of the court of appeals in this case and the decision of this Court in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995). *First Options* merely holds that a tribunal must look to the parties' contract in deciding whether a court or an arbitration panel should decide the question of arbitrability *vel non*. *Id.* at 943-44. More generally, *First Options* stands for the rather unremarkable proposition that when a controversy relates to the terms and interpretation of a contract, the court's inquiry must begin with,

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[4] The same principle is commonly applied to permit non-parties to contracts containing arbitration clauses to enforce such clauses when they are sued on those contracts. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993); *Hughes Masonry Co., Inc. v. Greater Clark County School Building Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) ("In short, [plaintiff] cannot have it both ways. [I]t cannot rely on the contract when it works to its advantage, and repudiate it when it works to [its] disadvantage.").

[5] "[R]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10(a). (1989). Those reasons are limited to (i) a conflict among courts of appeals; (ii) a conflict between a state court of last resort and a circuit court; or (iii) an important question of federal law that should be settled by the Court. *Id.* It is axiomatic that review of factual determinations, such as those made here, is not ordinarily within this Court's certiorari jurisdiction.

and focus on, the language of that instrument as the best possible evidence of the parties' intent. Neither the particular adjudications of the circuit court in the instant case, nor its particular enunciation of pertinent contract law, are in conflict with *First Options*. To the contrary, in examining the constituent parts of the Warehouse Receipts, and in concluding that those parts form an integrated instrument, the circuit court here was giving effect to the general rules of contract construction reiterated by *First Options*.

7. Similarly, there is no conflict between the decision of the court of appeals in this case and the decision of the United States Court of Appeals for the Third Circuit in *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287 (3d Cir.), *cert. denied*, 519 U.S. 1028 (1996).[6] *Dayhoff* concerned three separate contracts for the licensing, distribution, and sale of candy, entered into by four distinct signatories. *Id.* at 1289. Each contract was individually enforceable, and each contained a different forum selection clause. *Id.* When defendant Heinz terminated all of the contracts upon the sale of its candy business to Hershey, Dayhoff sued all signatories, as well as Hershey, for breach of contract in the Western District of Pennsylvania. *Id.* at 1290.

8. The court of appeals held that the parties to each agreement were required to litigate in their contractually chosen forum, and affirmed the dismissal of Dayhoff's claims as against signatories that had designated other fora in which to resolve their differences. *Id.* at 1303. In contrast, the circuit court allowed

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[6] The court of appeals' decision in this case is unpublished. Pursuant to Second Circuit Local Rule 0.23, such decisions "do not constitute formal opinions of the court and . . . shall not be cited or otherwise used in unrelated cases before this or any other court." Second Circuit Local Rule 0.23 As it cannot "be cited or otherwise used," the court of appeals decision cannot serve as one branch of a circuit conflict.

Dayhoff's claims against Hershey to proceed because Hershey's liability arose independently of the contracts (to which Hershey was not a party and with which it was not in privity, unlike Albany in the case at bar). Predicated on this holding, Albany asserts that because BancoMex was not a party to the Warehouse Receipts, it should not have been permitted to avail itself of the forum selection clauses in those instruments (Petition at 21), yet it overlooks the fact that *Albany* itself and BancoMex itself were essentially in privity with the parties to the contract, in the former case because Albany was subrogated to the rights of contract parties, and in the latter case because Albany sought to impose liability on BancoMex *under the contracts*. This explains why there is no conflict between any rule enunciated by *Dayhoff* and by the decision of the circuit court in the instant case. Of course, neither case enunciates any particularly novel or important rule of law, but more importantly, the rules they do rely upon are not inconsistent. Rather, both these cases merely apply the same settled contract law principles to forum selection clauses to reach their wholly unremarkable results.

9. Moreover, *Dayhoff* is inapposite to the case at bar. *First*, in the case at bar, neither constituent contract instrument alone imposes any duty upon Somex; both must be presented simultaneously to trigger any obligation. Unlike *Dayhoff*, the constituent contract parts here are not individually enforceable contracts with distinct parties, but are a single, integrated agreement. *Second*, the forum selection clauses contained in the Bonos ("the interested parties agree to submit to the tribunals of . . . Mexico") (App. 3a) create a category of beneficiaries that is inclusive of, but not limited to, the signatories to the contract. *Cf. In re Prudential Insurance Co.*, 133 F.3d 225, 229-30 (3d Cir. 1998)(distinguishing *Dayhoff* on basis that contracts there did not create a class of intended beneficiaries, other than actual signatories, who could avail themselves of the contractual forum selection clauses). *Third*, in seeking to curtail BancoMex's recourse

to the contract between its Insureds and Somex, Albany ignores its own complaint, which sought to impose contract liability upon BancoMex for the independent actions of its subsidiary, Somex. (App. 16a)*

10. Finally, Albany would have the Court conclude that because *Dayhoff* allegedly "declined to follow conflicting decisions of the Ninth" and other circuits (Petition at 21 n. 2), it somehow created an important circuit conflict that can and should be resolved by the grant of certiorari in *this* case. In fact, *Dayhoff* did no such thing. The court of appeals there merely adopted a narrow reading of the Ninth Circuit's opinion in *Manetti-Farrow, Inc. v. Gucci America, Inc.*, 858 F.2d 509 (9th Cir. 1988). It declined to follow *Manetti-Farrow* on the facts presented in *Dayhoff*, while still citing it for the general (and rather unremarkable) proposition that non-signatories may be bound by contractual forum selection clauses. *Dayhoff*, 86 F.3d at 1295. *Manetti-Farrow* does not propound a blanket rule in opposition to the decision of another circuit, and the Third Circuit did not cite it for such a general rule. Rather, it holds that a forum selection clause will govern claims asserted by a non-signatory only where those claims are closely related to the contractual provision at issue. *Manetti-Farrow*, 858 F.2d at 514. Thus, *Manetti-Farrow* lends further support to BancoMex's position by holding that the scope of a forum selection clause "depends on whether resolution of the claims relates to the interpretation of the contract." *Id.* The Ninth Circuit's reasoning in *Manetti-Farrow*, therefore, does not conflict with the Third Circuit's logic in *Dayhoff*, though the two courts

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* Albany equally ignores the fact that it shares BancoMex's non-signatory contract status; its claims are based on its status as subrogee. If the parties' entitlement to assert or defend claims based on the contracts is dependent upon signatory status, then Albany may not assert a contract claim. But Albany's very assertion of the contract claim belies this.

reached differing results based on the factual circumstances underlying each decision.

11. In short, there is no conflict on an important matter between any decision of this Court and the decision of the court of appeals below. There is no conflict on an important matter between decisions of the courts of appeals that is raised by this petition. And there is no challenge to any action of the lower courts in the nature of an assertion that they have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." Sup. Ct. R. 10 (a). The petition at best seeks a further level of appellate factual review that is unavailable in this Court. This avenue of relief is foreclosed — Albany's remedy lies where it always did, in the Courts of Mexico.

* * *

CONCLUSION

For the reasons given above, the Court should deny the petition for a writ of certiorari.

Dated: New York, New York
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